(11)

No. 06-1505 4-11-08

In The
Supreme Court of the United States

CLIFFORD B. MEACHAM *et al.*,

Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE EMPLOYMENT AND LABOR LAW COMMITTEE OF THE ASSOCIATION OF CORPORATE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

DAVID E. NAGLE
Counsel of Record
JACKSON LEWIS LLP
321 West Franklin Street
Richmond, Virginia 23220
(804) 649-0404

Attorneys for The Employment and Labor Law Committee of The Association of Corporate Counsel

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE *AMICUS CURIAE*[1]

The Association of Corporate Counsel ("ACC") is the in-house bar association, serving the professional needs of attorneys who practice in the legal departments of corporations and other private sector organizations worldwide. Since its founding in 1982, the ACC has grown to include more than 23,000 individual in-house counsel members who work in more than 9,000 business entities worldwide. In the United States, ACC members are at work in every one of the Fortune 100 companies.

One of the primary missions of the ACC is to act as the voice of the in-house bar on matters of concern to corporate legal departments, and matters implicating the ability of its members to fulfill their functions as legal counselors to their corporate clients.

The Employment and Labor Law Committee of The Association of Corporate Counsel ("the Committee") is one of the Association's largest committees, with over 5,000 attorney members. Most of those who are members of the Committee function as in-house counsel on workplace law issues, advising employers with respect to employment litigation and counseling with respect to personnel actions.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than The Association of Corporate Counsel, its members, and its counsel, made such a monetary contribution.

SUMMARY OF ARGUMENT

The Employment and Labor Law Committee of The Association of Corporate Counsel ("the Committee") believes that the Second Circuit was correct in concluding that an employee alleging disparate impact discrimination under the Age Discrimination in Employment Act ("the ADEA") bears the burden of proving that the employer's justification for the challenged employment action is unreasonable. The Committee concurs with the argument advanced by the Respondents.

The Committee believes that the alternative formulations of the test, as advanced by Petitioners and the government, are flawed and unworkable. As this Court held in *Smith v. City of Jackson*, 544 U.S. 228 (2005) the "business necessity" test is not applicable in an ADEA disparate impact case; rather, the appropriate test is that of "reasonableness." An employer is not liable for disparate impact discrimination under the ADEA so long as the employer's actions, taken in reliance upon reasonable factors other than age, constituted a reasonable means to achieve the employer's legitimate business objectives. Once the employer has satisfied the burden of producing evidence of a legitimate business justification for its action, the employee must ultimately be the one with the burden to persuade the factfinder that the employer's asserted basis for the neutral policy is unreasonable.

The Committee believes that adoption of the test advanced by Petitioners, or that advanced by the government, will encourage disparate impact claims and litigation where *any* statistical evidence may support a disparate impact claim of age discrimination. Treating the "reasonable factors other than age" as an affirmative defense on which the employer has the burden of proof would render it vastly more difficult for courts to identify and dispose of meritless cases through summary judgment. As every hour of litigation is costly both to the parties and the taxpayers, this expense should not be incurred needlessly. Indeed, despite the express recognition by Congress in the ADEA that actions taken on the basis of "reasonable factors other than age" are not unlawful, if required to prove the reasonableness of their personnel actions affirmatively, employers will likely be discouraged from engaging in a thoughtful analytical process like that utilized by Respondent, when called upon to make difficult personnel decisions affecting groups of employees, such as the selection of those to be affected by a reduction-in-force. In the interests of reducing the risk of litigation and attendant costs, employers may be motivated to permit a statistical analysis to determine the selection process, thus having the unintended consequence of *making* age a factor in personnel decisions in order to reduce the risk of litigation under a statute purporting to prohibit consideration of that very factor.

ARGUMENT

THE SECOND CIRCUIT'S ANALYSIS IS CORRECT AND THE JUDGMENT BELOW SHOULD BE AFFIRMED

A. The Second Circuit Correctly Placed Upon the Employee the Burden of Proving That the Employer's Justification Is Unreasonable.

The Second Circuit stated:

> First, we consider who bears the burden of persuasion with respect to the "reasonableness" of the employer's proffered business justification under the ADEA disparate-impact framework. The best reading of the text of the ADEA – in light of *City of Jackson* and *Wards Cove* – is that the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable. *See Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006) (holding that under City of Jackson, once employer has satisfied burden of producing evidence of legitimate business justification, to prevail "employee must ultimately persuade the factfinder that the employer's asserted basis for the neutral policy is unreasonable").

Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 141 (2d Cir. 2006).

In reaching this conclusion, the Court identified several factors, but emphasized one:

> *City of Jackson* reasoned that the "narrower" scope of disparate-impact liability under the ADEA (as compared with Title VII) is justified because "age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment," and that as a result, "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *City of Jackson*, 544 U.S. at 240-41. *It would seem redundant to place on an employer the burden of demonstrating that routine and otherwise unexceptionable employment criteria are reasonable. . . . [Therefore, an ADEA plaintiff cannot] prevail on a showing of disparate impact based on a factor that correlates with age without also demonstrating that the factor is unreasonable.*

Meacham, 461 F.3d at 142-43 (emphasis added)

The Committee believes that the Second Circuit's analysis is correct, and should be affirmed. The Committee concurs with the arguments which have been advanced by the Respondents in Argument section I.

B. The Tests Which Are Advocated by the Petitioners and the Government Are Flawed and Unworkable.

In addition to being legally flawed for the reasons stated by Respondents in their brief, the position advanced by the Petitioner should be rejected by this Court because it would give undue weight to statistical age disparities created by legitimate business decisions and would prevent the early judicial resolution of meritless claims. Great care must be exercised in the weight that is given to statistical analyses conducted with respect to a reduction in force (RIF). A cautious employer may analyze projected RIF selections for evidence of adverse impact in order to evaluate whether there is or may be a pattern of selections which might support a statistical case of discrimination. However, as several commentators have observed, there are considerable risks in performing such an analysis and the results of even a well-planned statistical study may raise questions to which there are no easy answers.

As one commentator observed:

> The ideal case occurs if the statistical report card contains only passing grades (*i.e.*, no statistically significant disparities appear that are adverse to any protected group). In that happy but unlikely case, an employer may proceed in the knowledge that it has in hand powerful evidence of a nondiscriminatory motive. The fortunate employer can testify that it recognized that even neutral

> decision making can adversely affect one or more protected groups; that it has carefully considered that issue, perhaps with the assistance of a highly qualified expert, and that it implemented the RIF only after it determined there was no adverse impact against any protected group.
>
> The reality is that such a result is the equivalent of winning the "RIF lottery" – so rare that no employer planning a large RIF can bank on this outcome. Rather, a contrary result is far more likely: the employer's initial RIF selections will adversely affect, statistically speaking, some protected group at some level of its organization. . . . [E]mployers generally cannot "reverse engineer" a large-scale RIF. That is, it usually will not be possible, and it undoubtedly is unlawful, first to create a demographic profile of a "balanced" RIF and then to select employees according to their demographic characteristics. Legal considerations aside, there simply are too many permutations when a company's organizational structure (*i.e.*, its divisions, plants, departments, and job classifications) is combined with the various protected classifications (*e.g.*, race, gender, ethnicity, etc.) to prescribe RIF selections that produce no statistical imbalances.

Allan G. King, *Statistics as a Guide to RIF Selections: Caveat Emptor*, 20 Lab. Law. 79, 80-81 (2004).

Recognizing the inference that arises from statistical evidence of a disparate impact created by a

challenged employment practice, another commentator observed:

> If the plaintiff can establish the prima facie case, employer-defendants are then forced to defend the RIF in court. The use of statistics is a circumstantial method of proof that the employer intended to discriminate in the RIF. Statistics that open the door may be available in a wide variety of cases because so many factors, on which many RIFs are routinely based, are associated with age. Consider, for example, the correlation of age with pension, benefits, and salary. The high costs associated with these factors are often motivating forces in designing a RIF. While each of these factors is considered a reasonable factor other than age, statistical data alone are sufficient information to begin a claim and force the employer to defend its action. Such data are particularly the type of information that discharged employees could request because a RIF based on these considerations would indicate that the action had a disparate impact on older employees.
>
> Thus, an employer, looking at statistical information that indicates that the planned RIF may have an adverse impact on older employees, may consider revising the RIF to avoid the possible legal challenge. However, employers may face additional problems in revising the RIF. The employees who traditionally have received the protections of the ADEA are older white males. In shifting the RIF to reduce the impact on workers

> protected by the ADEA, the RIF is likely to fall more harshly upon workers who have entered the workforce within the last twenty years. Among the fastest growing groups entering the workforce over the last few years are women and minorities. Women and minorities have always been protected by Title VII and continue to have a disparate impact cause of action available in their legal arsenal. Thus, an attempt to redesign a RIF in order to avoid an ADEA disparate impact claim may shift the burden to females and minorities, who then may have a legal cause for a Title VII disparate impact claim. This is consistent with the fact that the group provided the greatest protection by the ADEA is Caucasian, white-collar males. Once again, the employer is forced to defend its actions in court.

Kelli A. Webb, *Learning How to Stand On Its Own: Will the Supreme Court's Attempt to Distinguish the ADEA from Title VII Save Employers from Increased Litigation?*, 66 Ohio St. L.J. 1375, 1407-08 (2005).

As this Court recognized in *City of Jackson*,

> Congress' decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment . . . Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite

> their adverse impact on older workers as a group. Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII. While the ADEA reflects Congress' intent to give older workers employment opportunities whenever possible, the RFOA provision reflects this historical difference.

City of Jackson, 544 U.S. at 240-41. As such, the existence of statistical disparities as to age should be treated in a manner consistent with the Congressional recognition that a lower threshold is applicable to an employer's justification of its non-discriminatory actions than that which is applicable in Title VII cases.

The risk of litigation involving disparate impact claims that are based upon statistical evidence which may have little probative value is of great concern to employers, and the likelihood that a personnel action will reflect a disparate impact associated with age is increasing. The Department of Labor's Bureau of Labor Statistics (BLS) forecast a 10 percent overall increase in the civilian labor force between 2004 and 2014, but during the same period of time, the BLS predicts that the number of workers aged fifty-five and older will increase by over 49% – almost five times the overall growth rate. Mitra Toossi, *Labor Force Projections to 2014: Retiring Boomers*, Monthly Lab. Rev., Nov. 2005, at 25, 26 tbl. 1.1, *cited in* Aida M. Alaka, *Corporate Reorganizations, Job*

Layoffs and Age Discrimination, 70 Alb. L. Rev. 143 (2006). Furthermore, BLS estimates that by 2012, workers under the age of forty will comprise only 46.8% of the civilian labor force. Mitra Toossi, *Labor Force Projections to 2012: The Graying of the U.S. Workforce*, Monthly Lab. Rev., Feb. 2004, at 37, 55 tbl. 8., *cited in* Alaka, *supra*, at 143.

If this Court should accept the Petitioner's suggestion that the burden of proof should be placed upon the defendant employer in such cases, after nothing more than statistical evidence of a disparate impact and identification of the specific practice challenged, then almost certainly it will be the rare case indeed that can be judicially concluded short of trial. In discussing summary judgment motions, one court noted,

> The showing by the moving party raising an affirmative defense must be strong indeed: When the movant is seeking summary judgment on the basis of an affirmative defense to which the movant bears the ultimate burden of proof at trial . . . the movant must establish the absence of a genuine issue of material fact as to every element of the affirmative defense. In other words, the movant must establish the affirmative defense as a matter of law such that no reasonable jury could enter a verdict for the nonmovant . . . If the movant satisfies this onerous burden, the burden shifts to the nonmovant to create a genuine issue of material fact as to any element essential to the affirmative defense . . . In cases where the defendant is the moving party, his task does

> not change even if he raises an affirmative defense on which he has the burden of persuasion. He must incontrovertibly prove his affirmative defense, because his goal is to take the case away from the jury. If the plaintiff shows any genuine issue of material fact (as to the affirmative defense or otherwise), the defendant loses the motion.

Anderson v. Deluxe Homes of Pa., Inc., 131 F. Supp. 2d 637, 649 (M.D. Pa. 2001). *See also Madden v. Chattanooga City Wide Serv. Dept., No. 1:06-CV-213*, 2007 U.S. Dist. LEXIS 78998, *14 n.2 (E.D. Tenn. 2007) ("It is difficult for a Court to ever grant summary judgment on an affirmative defense raised by the party carrying the burden of proof.").

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and [Rule 56] should be interpreted in a way that allows it to accomplish this purpose." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). As another court explained,

> [I]f the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor.
>
> If the movant, however, does not bear the burden of proof, he should be able to obtain summary judgment simply by disproving the existence of any essential element of

> the opposing party's claim or affirmative defense. . . . The crucial question for the court is whether there is a "genuine issue" of fact concerning any essential element of the claim on which judgment is being sought. If the moving party can show that there is no evidence whatever to establish one or more essential elements of a claim on which the opposing party has the burden of proof, trial would be a bootless exercise, fated for an inevitable result but at continued expense for the parties, the preemption of a trial date that might have been used for other litigants waiting impatiently in the judicial queue, and a burden on the court and the taxpayers.

Fontenot v. The Upjohn Co., 780 F.2d 1190, 1194-95 (5th Cir. 1986).

The Committee respectfully urges the affirmance of the judgment below, and adoption of the formulation utilized by the Second Circuit, placing the burden of proof as to the reasonableness of the employer's action upon the plaintiff. If the Court were to adopt the formulations advocated by the Petitioners or the government, the opportunity for a court to dispose of unsupported cases through the use of the summary judgment process would be severely curtailed in ADEA cases burdening the courts with unnecessary trials and burdening the litigants with the unwarranted disruption, expense and uncertainty associated with litigation. In an effort to reduce the risk of litigation, it is likely that the resultant statistical analyses, rather than the reasonable factors

other than age, will contribute to age-driven, rather than age-neutral, personnel actions, creating indirect age discrimination from a statute designed to prohibit such conduct.

Although addressing a case which arose in the context of a "reverse discrimination" claim brought under Title VII (unlike the ADEA case presented here) a member of this Court recognized a comparable opportunity for lamentable, unintended consequences, when he wrote the following:

> This Court's prior interpretations of Title VII, especially the decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), subject employers to a potential Title VII suit whenever there is a noticeable imbalance in the representation of minorities or women in the employer's work force. Even the employer who is confident of ultimately prevailing in such a suit must contemplate the expense and adverse publicity of a trial, because the extent of the imbalance, and the "job relatedness" of his selection criteria, are questions of fact to be explored through rebuttal and counterrebuttal of a "prima facie case" consisting of no more than the showing that the employer's selection process "selects those from the protected class at a 'significantly' lesser rate than their counterparts." B. Schlei & P. Grossman, *Employment Discrimination Law* 91 (2d ed. 1983). . . . Thus, after today's decision, the *failure* to [take action in response to statistical disparities may be] economic folly, and arguably a breach of duty to shareholders or

> taxpayers [because of the cost of litigation.] . . . A statute designed to establish a color-blind and gender-blind workplace has thus been converted into a powerful engine of racism and sexism, not merely *permitting* intentional race- and sex-based discrimination, but often making it, through operation of the legal system, practically compelled.

Johnson v. Transp. Agency, Santa Clara Co., 480 U.S. 616, 676-77 (1987) (Scalia, J., dissenting).

To the extent that scant statistical evidence of a disparate impact associated with age can create the substantial risk of disparate impact discrimination claims based upon age, and particularly litigation which will be exceedingly difficult to dispose of through summary judgment proceedings (as will be the case if the Petitioners' view is adopted), then employers are likely to find themselves facing the same dilemma as that described in Justice Scalia's dissent in *Johnson*.

To borrow the language of one commentator, "[S]tatistics inherently are an unhelpful or misleading gauge of a selection process [and] the statistical 'tail' cannot, and should not, wag the 'dog' that is the selection process itself. King, *supra*, at 81. The Committee urges the Court to affirm the judgment below, and adopt the view expressed by the Second Circuit, when it concluded that "The best reading of the text of the ADEA – in light of *City of Jackson* and *Wards Cove* – is that the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable."

CONCLUSION

For the reasons set forth above, and the arguments advanced by the Respondents, The Employment and Labor Law Committee of The Association of Corporate Counsel, as *amicus curiae*, respectfully urges the Court to affirm the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

THE EMPLOYMENT AND
LABOR LAW COMMITTEE OF
THE ASSOCIATION OF
CORPORATE COUNSEL

DAVID E. NAGLE
Counsel of Record
JACKSON LEWIS LLP
321 West Franklin Street
Richmond, Virginia 23220
(804) 649-0404

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